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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-892

NORMAN WINSLOW, JIMMIE W. LAUDERDALE and IRA NEWTON,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

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TABLE OF CONTENTS

	PAGE
Judgments and Opinion Below	2
Jurisdiction of this Court	2
Questions Presented for Review	2
Constitutional Provisions Involved	3
Raising the Federal Questions	4
Statement of the Case	5
Reasons for Granting the Writ	9
1. Petitioners' arrest and detention for investigation was unconstitutional and violative of their Fourth Amendment rights, where the facts known to the arresting officers do not demonstrate probable cause, and there was no reason to believe that petitioners, or any of them, were "armed and dangerous"	9
2. A defendant has a constitutional right to expect that the appellate process will apply, against the prosecution, the waiver theory so frequently applied against defendants	15
3. The Illinois Appellate Court has refused to apply the exclusionary rule, which is part of the Fourth Amendment to the United States Constitution	16

Conclusion 18

Appendices:

A—Opinion of Appellate Court of Illinois, Second District 1a

B—Order of Illinois Supreme Court denying petition for leave to appeal 10a

AUTHORITIES CITED

Cases

Adams v. Williams, 407 U.S. 143 (1972) 10, 14
Beck v. Ohio, 379 U.S. 89 (1964) 11, 14
Giordonello v. United States, 357 U.S. 480 (1958) 15
Henry v. United States, 361 U.S. 98 (1959) 12
Mapp v. Ohio, 367 U.S. 643 (1961) 17
People v. McAdrian, 52 Ill.2d 250, 287 N.E.2d 688 (1972) 15
Sibron v. New York, 392 U.S. 40 (1968) 14
Spinelli v. United States, 393 U.S. 410 (1968) 14
Terry v. Ohio, 392 U.S. 1 (1968) 9, 11, 13
United States v. Brigoni-Ponce, ... U.S. ....., 45 L.Ed. 2d 607 (1975) 10
Wong Sun v. United States, 371 U.S. 471 (1963) 17

Other Authorities

U.S. Constitution, Amendment IV 4, 17
U.S. Constitution, Amendment XIV 3, 17
28 U.S.C. 1257 (3) 2
Supreme Court Rule 22 2

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

Petitioners, Norman Winslow, Jimmie W. Lauderdale and Ira Newton, respectfully pray that a writ of certiorari be issued to the Appellate Court of Illinois, Second District, to review its decision affirming judgments of conviction in the Circuit Court of DuPage County, Illinois, adjudging petitioners guilty of the offense of attempt burglary.

Judgments and Opinion Below

On March 31, 1975, the Illinois Appellate Court, Second District, rendered an opinion affirming petitioners' convictions as modified in part, and vacated in part.* No. 73-313 reported at 325 N.E.2d 426 (1975). A copy of the Appellate Court's opinion is attached hereto as Appendix A. A petition for leave to appeal to the Illinois Supreme Court, timely filed, was denied on September 25, 1974. (No. 47479) (Appendix B)

Jurisdiction of This Court

The judgment sought to be reviewed (the Illinois Supreme Court's denial of the petition for leave to appeal) was entered on September 25, 1975. This petition for writ of certiorari is filed within 90 days from said denial. Jurisdiction of this Court is invoked under Title 28, United States Code, Sec. 1257(3) and Rule 22 of the Rules of this Court.

Questions Presented for Review

1. May an arrest or detention for investigative purposes—deemed a "forcible stop" by the State reviewing court—be upheld as consistent with Fourth Amendment requirements, without probable cause and absent reason to believe that the arrestee is armed and dangerous?

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* The Appellate Court affirmed petitioners' attempt burglary convictions as modified, (sentences reduced from 2-8 to 1-3 years), and vacated their convictions and concurrent sentences for attempt theft and possession of burglary tools, (App. A, p. 9a), pursuant to the State's confession of error. (App. A, p. 5a, fn. 1)

2. If such a seizure of the person as stated in Question 1 may ever be constitutional, was the arrest of petitioners herein constitutionally valid upon the facts of this case?

3. Where the arrest was justified at the trial level, both by the State and by the court, solely as being based upon probable cause:

   A. May the State reviewing court, consistent with due process of law, affirm on a wholly different theory not litigated below, *i.e.*, stop-and-frisk or "forcible stop"?

   B. Does a defendant have a right to enforce against the prosecution the theory of waiver so frequently applied by reviewing courts against defendants?

4. Have the Illinois courts herein improperly refused to apply the exclusionary rule of the Fourth Amendment by upholding the search and seizure of incriminating items from petitioners and from the van in which they were arrested, where: (a) the sole and proximate cause of such search and seizure was petitioners' illegal arrest as set forth in Question 1 and 2 above; (b) the State conceded the search and seizure was tainted thereby; and (c) the State failed to demonstrate that the taint had been removed or attenuated?

Constitutional Provisions Involved

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that:

> "Section 1. . . . [N]or shall any State deprive any person of . . . liberty . . . without due process of law; . . ."

The Fourth Amendment to the Constitution of the United States provides in pertinent part that:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . ."

Raising the Federal Questions

Petitioners raised in the trial court that their Fourth Amendment rights were violated by moving to suppress, asserting that their initial arrest was without probable cause and that the items seized were tainted by the original arrest. The State responded by asserting that petitioners' initial detention was an arrest based on probable cause. The State did not dispute that said original arrest, if illegal, tainted the evidence subsequently seized. The trial court denied petitioners' motion to suppress.

In the Appellate Court, the State abandoned its theory below, *i.e.*, probable cause for arrest, and asserted this was a stop and frisk. The Appellate Court held that this was neither a stop and frisk nor an arrest, but a forcible detention for the purpose of investigation, and that therefore probable cause was not necessary. The Appellate Court held that even if this was an illegal arrest, the evidence need not be suppressed.

In petition for leave to appeal to the Illinois Supreme Court, petitioners asserted the denial of their Fourth Amendment rights and that the opinion of the Appellate Court denied them due process, in that it failed to apply the "waiver theory" against the State.

Statement of the Case

Facts Concerning The Arrest And Search

Petitioners were arrested in the parking lot of the Oak Brook Shopping Center on February 22, 1972, by Village of Oak Brook police officers. Ronald Carlson, the officer assigned to patrol the area, was on surveillance in the shopping center parked in an unmarked squad car in the parking lot. About 10:30 A.M. he noticed a green van approach the parking area near the location of his car, drive down several of the parking aisles and then disappear from his sight. Approximately five minutes later he noticed the van as it returned to the area and parked approximately 125 feet from his car. Two men exited. Carlson said he saw the two men approach an unoccupied car which was parked approximately 100-150 feet from where Officer Carlson was parked.

Officer Carlson testified that when one man, whom Carlson identified as petitioner Winslow, reached the car, he remained behind the vehicle while the other man, identified by Carlson as Lauderdale, proceeded to the passenger side. Carlson was parked on the driver's side of the car and could see only the chest-to-head portion of Lauderdale's body. He could not see his hands. The officer testified that the man he identified as Lauderdale "seemed to put his arms together in a motion like this (indicating) • • • and then sort of came up on his feet and then down like this (indicating)". The action was characterized as a "jerking" motion and a "pulling" motion. (App. A, pp. 1a-2a)

The officer did not know if this man had anything in his hand, (Vol. 1, Tr. 66),[1] and did not know if he had touched

[1] "Tr." refers to the Transcript of Proceedings.

or done anything else to the automobile (Vol. I, Tr. 67, 70-71):

"Q. Do you know whether or not the auto had been tampered with when you placed them under arrest?

A. No." (Vol. I, Tr. 70-71)

The officer did not know whether the jerking motion was just caused by the man picking something up. (Vol. I, Tr. 66)

Petitioners Winslow and Lauderdale then walked away from the car and Lauderdale threw something under another car (a Chevrolet station wagon). The officer had not seen what was thrown under the station wagon. (Vol. I, Tr. 69)

"Q. Did you notice at that time, or could you observe what object that was?

A. No.

Q. So you didn't know at that time whether or not it was a wire cutter or anything of that sort. Is that correct?

A. That's correct." (Vol. I, Tr. 69)

At this moment, with no other evidence, and before the officer had viewed the 1966 Chevy or recovered what he believed one of the petitioners had dropped, petitioners Lauderdale and Winslow were placed under arrest and searched.

"Q. You detained them. Is that correct?

A. That's correct.

Q. Did you search them?

A. At that time I don't think we did. I don't recall at this time.

Q. Why were they under arrest?

A. At what point.

Q. No. Were they under arrest when you went up to them?

A. Yes, they were.

Q. This is before you went to the Chevrolet. Is that correct?

A. Yes.

Q. This is before you knew the auto had been tampered with. Is that not correct?

A. Before I knew the auto had been tampered with?

Q. Yes." (Vol. I, Tr. 70)

"Q. Now based upon this, you stated that you had the two defendants, Lauderdale and Winslow up against the car and you searched them, is that correct?

A. That's right." (Vol. II, Tr. 38)

After Officer Carlson arrested petitioners Winslow and Lauderdale, they were then detained by another officer from the marked squad car while Carlson looked underneath the Chevrolet station wagon. (The marked car had responded to Officer Carlson's radio call.)

He found a wire cutter type of device which had been worked into a tool and an automotive door lock. He then walked back to the car and saw that the door lock had been removed.

Carlson then walked over to where the green van was parked where Officer Savaglio, who had also answered Carlson's call, was holding petitioner Newton. Carlson said Newton was the same man he had originally seen in the passenger seat of the van and who had moved over to the driver's seat when the two subjects left it to go to the car. Carlson looked inside the van and noticed numerous tools.

He then searched the vehicle and inventoried the items, describing various hand tools, an attache case on the front seat, a power "wench" [sic], a citizen's band radio, various hand tools, and screwdrivers. He also saw some common tools lying in the rear of the van, such as tin snips, vice grips, a drill, and some wrenches. He opened the attache case and found a key cutter, pliers, a wire cutter, an adjustable wrench, a bent screwdriver and various key blanks with number designations on them ('66, '67, '68, '69, '70, '71, '72). (App. A, p. 3a)

Following denial of the motion to suppress, petitioners were tried by the court and convicted of attempt burglary, attempt theft, and possession of burglary tools. Each was sentenced to concurrent terms of 2-8 years, 1 year, and 1-2 years imprisonment upon the 3 counts. (App. A, p. 1)

The Appellate Court affirmed the burglary convictions as modified, reducing sentences thereon to 1-3 years, and vacating the convictions and sentences on the other counts. (App. A, p. 9a; see App. A, p. 5a, fn. 1.)

REASONS FOR GRANTING THE WRIT

1.

Petitioners' arrest and detention for investigation was unconstitutional and violative of their Fourth Amendment rights, where the facts known to the arresting officers do not demonstrate probable cause, and there was no reason to believe that petitioners, or any of them, were "armed and dangerous."

Presented by the opinion of the Illinois Appellate Court is the issue which this Court in *Terry* v. *Ohio,* 392 U.S. 1 (1968), expressly declined to decide, *i.e.,* whether facts not amounting to probable cause could justify an "investigative seizure" short of an arrest, *id.* at 19 n.16, where the seizure was not a patdown for weapons for the protection of an officer investigating suspicious behavior of persons he reasonably believed to be armed and dangerous. For although the Appellate Court properly rejected the State's argument on appeal that it could justify the detention of defendants on the basis of "stop and frisk", (App. A, p. 6a), it upheld the police conduct herein upon the theory that "[T]here were appropriate circumstances for the officers to 'forcibly stop' the defendants for an investigation of possible criminal behavior . . ." (App. A, p. 8a) The Appellate Court stated that the police detained petitioners Lauderdale and Winslow "in order to maintain the status quo while the officers gathered additional information as to the nature of the object they had seen Lauderdale throw under another vehicle . . ." (App. A, p. 6a)

The court thereby created a new type of police infringement upon citizens, *i.e.,* a "forcible stop." This is not the

limited seizure authorized to protect the officer pursuant to *Terry* v. *Ohio, supra,* during a street confrontation between a police officer and a citizen, but rather is a full-blown detention of a citizen without probable cause so that the police may conduct an investigation in order to determine if probable cause exists.

Although the Appellate Court relied on language in *Adams* v. *Williams,* 407 U.S. 143 (1972), such reliance was misplaced. For as this Court recognized in *United States* v. *Brigoni-Ponce,* ..... U.S. ....., ..., 45 L.Ed.2d 607, 616 (1975):

> "[I]n both *Terry* and *Adams* v. *Williams* the investigating officers had reasonable grounds to believe that the suspects were armed and that they might be dangerous."

No such grounds existed in this cause.

Nor does this Court's opinion in *United States* v. *Brigoni-Ponce, supra,* generally authorize on-the-street investigative detentions based upon less than probable cause. There, the Court permitted investigative detention "because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for *policing the border . . .*" *Id.* at 616. (Emphasis added.) The Court's opinion was specifically limited to border area stops and was not meant to authorize investigative detentions of citizens on less than probable cause in an urban setting during routine investigation of suspicious activity.

To hold otherwise under the facts of this case, (see pp. 4-7, *supra*), would effectively totally negate the Fourth Amendment in regard to street investigative detentions,

and would give the police carte blanche to detain any person for investigation based on mere suspicion unsupported by articulated facts, contrary to this Court's holding in *Beck* v. *Ohio,* 379 U.S. 89 (1964). The nightmare of Mr. Justice Douglas, in his dissent in *Terry* v. *Ohio, supra*—that police would be authorized to seize citizens for investigation in circumstances where a magistrate would deny a warrant for lack of probable cause—will become reality. In *Terry,* he stated:

> "To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment. Until the Fourth Amendment, which is closely allied with the Fifth, is rewritten, the person and the effects of the individual are beyond the reach of all government agencies until there are reasonable grounds to believe (probable cause) that a criminal venture has been launched or is about to be launched.
>
> There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.
>
> Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can 'seize' and 'search' him in their discretion, we enter a new regime." Mr. Justice Douglas, dissenting, in *Terry* v. *Ohio,* 392 U.S. 1, 35, at 38-39 (1968). (Footnote omitted.)

The facts known to the officer, when tested by Terry* v. *Ohio, Sibron* v. *New York, and Adams* v. *Williams, render the arrest unconstitutional.

Assuming, *arguendo,* that the police can ever effect on-the-street detention for the purpose of investigation, the facts do not justify such detention in the case at bar.

At the time of the detention, *i.e.,* arrest,[2] the officer had merely seen petitioner Newton enter the parking lot of a shopping center in a van and park the van, and saw the two other petitioners—Lauderdale and Winslow—leave the van. This was at 10:00 a.m. Petitioner Newton then approached a car and petitioner Lauderdale was seen making a pulling motion. The officer did not know if he had anything in his hand, (Vol. I, Tr. 66), and did not know if he had touched or done anything else to the automobile. (Vol. I, Tr. 67, 70-71)

> "Q. Do you know whether or not the auto had been tampered with when you placed them under arrest?
>
> A. No." (Vol. I, Tr. 70-71)

The officer did not know whether the jerking motion was just caused by Lauderdale picking something up. (Vol. I, Tr. 66)

Petitioners Winslow and Lauderdale then walked away from the car and Lauderdale threw something under another car. The officer had not seen what was thrown under the car. (Vol. I, Tr. 69)

> "Q. Did you notice at that time, or could you observe what object that was?
>
> A. No.
>
> Q. So you didn't know at that time whether or not

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[2] The interference with petitioners' freedom of movement clearly constituted an arrest, *Henry* v. *United States,* 361 U.S. 98 (1959), and it was articulated as such by the arresting officer. (Vol. I, Tr. 66-71; see p. 6, *supra.*)

it was a wire cutter or anything of that sort. Is that correct?

A. That's correct." (Vol. I, Tr. 69)

Petitioners Winslow and Lauderdale were arrested before the officer discovered that a crime had been committed. The officer did not know that either petitioner had even touched the car. The officer did not know that any damage had been done to the car. The officer did not know what had been discarded. The officer did not know whether the car belonged to any of the petitioners.

At this moment, with no other evidence, and before the officer had viewed the 1966 Chevy or recovered what he believed one of the petitioners had discarded, there was no probable cause to place petitioners Lauderdale, Winslow and Newton under arrest, and the detention was unreasonable. For here there was far less than what was observed in *Terry, supra*;[3] nor was there a tip from an informer

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[3] In *Terry* v. *Ohio*, 392 U.S. 1, 22-23 (1968), this Court stated: "He had observed Terry, Chilton, and Katz go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation. There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away."

substantially corroborated, as in *Adams* v. *Williams*, 407 U.S. 143 (1972). The situation is far more comparable to *Sibron* v. *New York*, 392 U.S. 40 (1968)—a mere hunch, not supported by facts. See *Beck* v. *Ohio*, 379 U.S. 89 (1964).

If the facts here be deemed to rise to the level necessary to permit an intrusion of a citizen's Fourth Amendment rights, the police can detain any citizen for investigation, for virtually anything. Because a police officer is constantly on the lookout for criminal activity, almost any actions can seem sinister to him; but this does not raise his hunch or suspicion to such a level as to justify an intrusion of a citizen's Fourth Amendment rights. *Cf. Spinelli* v. *United States*, 393 U.S. 410, 418 (1968), where this Court stated:

> "[T]he allegations detailing the FBI's surveillance of Spinelli and its investigation of the telephone company records contain no suggestion of criminal conduct when taken by themselves—and they are not endowed with an aura of suspicion by virtue of the informer's tip."

Here, the facts known to the officers must not be deemed to render constitutionally reasonable petitioners' arrest and detention "for investigation."

Certiorari should be allowed so that this Court may address itself to the issue squarely presented herein as to the constitutional validity of a "forcible stop" for investigative purposes, without probable cause and absent reason to believe the suspects were armed and dangerous. This is an issue of extreme importance to the administration of criminal justice, but upon which this Court has not yet spoken.

2.

A defendant has a constitutional right to expect that the appellate process will apply, against the prosecution, the waiver theory so frequently applied against defendants.

At trial, the State asserted that the initial encounter between petitioners and the police was an arrest based upon probable cause. (C. 38)[4] On appeal, it abandoned this theory and relied, instead, solely upon the stop-and-frisk rationale. Petitioners asserted in the Appellate Court that the State was prevented, by the doctrine of waiver, from raising for the first time on appeal that the police conduct was proper as a stop and frisk, citing *People* v. *McAdrian*, 52 Ill.2d 250, 287 N.E.2d 688 (1972). Confronted with such waiver theory, and recognizing that there was no probable cause sufficient to justify arrest, the Illinois Appellate Court simply created a new category of policy activity, the "forcible stop." Such semantic gymnastics deprived petitioners of the right to litigate the stop and frisk or forcible stop issue, and of the right to rely upon application of the doctrine of waiver against the State on review. See *Giordonello* v. *United States*, 357 U.S. 480, 488-9 (1958).

Petitioners were thereby precluded from litigating the very issue upon which the reviewing court's affirmance was predicated. (App. A, pp. 6a-8a)

Certiorari should be granted to determine this most important question as to whether a defendant in a criminal case has a constitutional right to the prosecution's being estopped from prevailing upon a legal theory neither raised nor ruled on below.

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[4] "C." refers to the Common Law Record.

3.

The Illinois Appellate Court has refused to apply the exclusionary rule, which is part of the Fourth Amendment to the United States Constitution.

The Appellate Court failed to apply the exclusionary rule, even though at trial, both the State[5] and the trial court[6] proceeded upon the basis that the search of the van was tainted by the improper arrest of petitioners Winslow, Lauderdale and Newton.

The Appellate Court avoided application of the exclusionary principle by setting up a straw man and then knocking it down. It thereby avoided those facts which demonstrated that the search of the van was tainted by the prior unconstitutional arrest of petitioners.

The Appellate Court stated:

> "Assuming, however, as the defendants contend, the actions of the officers during the initial stages of the defendants' detention amounted to an arrest without probable cause rather than a 'forcible stop', this fact would not affect the decision in this case. The trial court does not lose jurisdiction to try the defendants because of an illegal arrest. . . . [citation omitted]
> It also would not affect the validity of the search and subsequent seizure of the tools, for the defendants' suspicious behavior and *the discovery of the door lock and tool established probable cause to search the van which was in the immediate vicinity and in which defendant Newton was stationed at the time of the crime.*" (App. A, p. 7a) (Emphasis added; footnote omitted.)

The court's reasoning is erroneous because, but for the illegal arrest of petitioners, neither Winslow, Lauderdale,

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5 Brief in Opposition to Motion to Suppress (C. 37-41).

6 Opinion of Court (C. 44-47).

Newton nor the van would have been present at the time that Officer Carlson determined that the car had been tampered with, and looked into and then searched the van. Petitioners Lauderdale and Winslow were proceeding to the van at the time they were arrested. No doubt, if not arrested, they would have entered the van and driven away, prior to the officer determining those facts which *subsequently* supplied probable cause.

Even if petitioners Winslow and Lauderdale had not entered the van, if not for petitioner Newton's arrest, he would have driven it away.

Hence, here, where the search of the van was a direct result of the illegal arrests of petitioners Lauderdale, Winslow and Newton, the exclusionary rule of the Fourth Amendment requires suppression of the evidence discovered. *Wong Sun* v. *United States,* 371 U.S. 471 (1963).

Moreover, here it is totally inappropriate for the Appellate Court to sustain the denial of the motion to suppress on the theory that there was no taint. The burden was on the prosecution to remove any primary taint. *Wong Sun* v. *United States, supra.* The State not only failed to present evidence to demonstrate that the taint was removed, but instead conceded that taint existed. (C. 37-41)

Under the circumstances, where taint was conceded to exist by the State in the trial court, the action of the Appellate Court deprived petitioners of their right to litigate said issue.

Since the exclusionary rule is part of the protection afforded by the Fourth Amendment, enforceable against the States through the due process clause of the Fourteenth Amendment, *Mapp* v. *Ohio,* 367 U.S. 643 (1961), the Ap-

pellate Court's holding—that evidence obtained subsequent to petitioners' arrest and as a direct result thereof should not be suppressed, although the State failed to sustain its burden of removing the primary taint—has thereby deviated from controlling authority and done violence to petitioners' constitutional rights.

Certiorari should be allowed so that this Court may clarify its position on pertinent constitutional questions, important to the administration of criminal justice, concerning the constitutional admissibility of evidence directly derived from unconstitutionally obtained evidence, including the concomitant issue concerning the prosecution's burden of proof.

CONCLUSION

Petitioners request that this Court issue a Writ of Certiorari to review the judgment of the Illinois Appellate Court, Second District.

Respectfully submitted,

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APPENDIX A

Opinion Of The Appellate Court Of Illinois.*

MR. PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

The defendants Norman Winslow, Jimmie W. Lauderdale and Ira Newton were convicted after a joint bench trial and sentenced for the offenses of attempt burglary (2-8 years in the penitentiary), attempt theft (1 year in the penitentiary) and possession of burglary tools (1-2 years in the penitentiary). The sentences were to run concurrently. Each of the defendants appeal. Each contends that the attempt burglary and attempt theft indictments are void, that they were improperly arrested and that this tainted the fruits of the subsequent search, and that the sentences are improper. Defendant Newton makes the additional claim that he was not proved guilty beyond a reasonable doubt.

The defendants were arrested in the parking lot of the Oak Brook Shopping Center on February 22, 1972, by police officers of the Village of Oak Brook. Ronald Carlson, the officer assigned to patrol the area, testified that he was on surveillance in the shopping center due to recent auto thefts and was parked in an unmarked squad car in the shopping center's parking lot. About 10:30 A.M. he noticed a green van approach the parking area near the location of his car, drive down several of

* No. 73-313. Opinion entered March 31, 1975. The opinion is published at 325 N.E.2d 426 (2nd Dist. 1975).

the parking aisles and then disappear from his sight. Approximately five minutes later he noticed the van as it returned to the area and parked approximately 125 feet from his car. Two men exited. Carlson said he saw the two men approach an unoccupied car which was parked approximately 100-150 feet from where Officer Carlson was parked.

It was brought out that the car was owned by Jane Corry, who, it was stipulated, had not given anyone permission to remove the locks or enter the car. Officer Carlson testified that upon reaching the Corry car one man, whom Carlson identified as defendant Winslow, remained in back of the vehicle and began looking around in all directions, while the other man, identified by Carlson as Lauderdale, proceeded to the passenger side of the car. Carlson was parked on the driver's side of the Corry vehicle and could see only the chest-to-head portion of Lauderdale's body. He could not see his hands. The officer testified that Lauderdale "seemed to put his arms together in a motion like this (indicating) * * * and then sort of came up on his feet and then down like this (indicating)". The action was characterized as a "jerking" motion and a "pulling" motion. Carlson said that after a short time the two men began to walk away from the car at what the officer characterized as a "rather swift pace". The officer radioed for assistance and then drove his car to the parking aisle down which the two men were walking. As he drove to within 40 feet of the men he noticed defendant Lauderdale throwing an object underneath a Chevrolet Station Wagon, although he could not at that time see what the object was. He said that at this particular time the men were walking much faster. At this time a marked squad car which had answered Officer Carlson's call came into the area. Officer Carlson stopped the two men he had

observed at the Corry vehicle and they were then detained by another officer from the marked squad car while Carlson looked underneath the Chevrolet Station Wagon. He found a wire cutter type of device which had been worked into a tool and an automotive door lock. He then walked back to the Corry car and saw that the door lock had been removed.

Carlson then walked over to where the green van was parked where Officer Savaglio, who had also answered Carlson's call, was holding the defendant Newton. Carlson said he was the same man he had originally seen in the passenger seat of the van and who had moved over to the driver's seat when the two subjects left it to go to the Corry car. Carlson looked inside the van and noticed numerous tools. He then searched the vehicle and inventoried the items, describing various hand tools, an attache case on the front seat, a power "wench" (sic), a citizens band radio, various hand tools, and screwdrivers. He also saw some common tools lying in the rear of the van, such as tin snips, vice grips, a drill, and some wrenches. He opened the attache case and found a key cutter, pliers, a wire cutter, an adjustable wrench, a bent screwdriver and various key blanks with number designations on them ('66, '67, '68, '69, '70, '71, '72). The officer stated that in his opinion, based upon his long experience, that these were burglar tools, although conceivably all of them were suitable for use in lawful jobs.

Officer Savaglio testified that he responded to Carlson's call and found the defendant Newton sitting in the passenger front seat of the van with the ignition key in the "on" position, although he could not remember whether the engine was running. He then ordered Newton to get out of the car and, in accordance with Carlson's instructions, arrested him.

The two officers were the only witnesses for the State. The defense moved for a directed finding and after this was denied, rested. The convictions followed.

Defendants' initial contention that the indictment for attempt burglary is void is based on the failure of the indictment to state that the entry into the motor vehicle was "without authority." The indictment as material states:

> "* * * with intent to commit the offense of burglary in violation of Section 19-1 (a), Chapter 38, Illinois Revised Statutes, 1971, did perform a substantial step toward the commission of that offense, in that they did knowingly remove the lock from the door of a 1966 Chevrolet motor vehicle, being the property of Jane Corry, with the intent to enter said motor vehicle and commit therein a theft, * * *"

We have previously held that an indictment charging attempt burglary is valid, although the words "without authority" are omitted. In charging attempt it is not necessary to set out all the elements of the crime itself; it is sufficient when the offense charged is in the language of the statute creating the offense and contains sufficient notice to the defendant to enable him to prepare his defense and to plead any judgment in bar to a subsequent prosecution for the same offense. (*People v. LaKeta* (1973), 10 Ill. App. 3d 876, 877.) We conclude that the attempt burglary indictment before us is sufficient to charge the offense under the statute. (Ill. Rev. Stat. 1971, ch. 38, par. 8-4(a).) The charge alleges both the intent to commit the offense and the overt act constituting a substantial step toward commission of that

offense and is, therefore, valid. *People v. Woodward* (1973), 55 Ill. 2d 134, 137-138.[1]

Defendant Newton's separate contention that he was not proved guilty beyond a reasonable doubt proceeds upon the reasoning that his presence in the truck, without more, is insufficient to sustain the conviction based on constructive possession of the items found in the truck. (*People v. Baxa* (1972), 50 Ill. 2d 111.) However, it is not correct, as this defendant claims, that the sole evidence against him is that he was merely a passenger in the van when the police arrested Winslow and Lauderdale in the parking lot. The judge could reasonably find from the whole record that Newton was a lookout for the other defendants under the circumstances. See *People v. Smith* (1973), 10 Ill. App. 3d 501, 504.

The defendants also argue that the convictions should be reversed because the trial court erred in refusing to suppress the evidence seized in the search of the van. They claim that their arrest occurred prior to the time when the officers discovered that a crime had been committed and, therefore, the arrest of defendants Lauderdale and Winslow was without probable cause. They then argue that the search of the van which followed was not based upon independent probable cause, and in any event the search of the attache case without a warrant was improper since there was no valid reason why it could not have been taken to the police station and a warrant obtained.

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[1] We have previously approved the People's motion to confess error as to the concurrent convictions for attempt theft and possession of burglary tools since they arose from the same conduct as the more serious offense of attempt burglary. See *People v. Whittington* (1970), 46 Ill. 2d 405, 409-10.

At the hearing on the pre-trial motion to suppress, the State argued that the police had probable cause for an investigatory detention when the defendants were first held and that the actual arrest and the search incidental to it did not take place until after the officer discovered the discarded lock and the lockless door on the Corry car. The State contended that this discovery provided ample probable cause to arrest the defendants. In this court, the State has maintained that the initial detention was justified on the basis of the doctrine of "stop and frisk", that the arrest was thereafter based on the investigation which resulted in probable cause to arrest and that the search is justified as properly incidental to the arrest. The defendants, however, object to application of the doctrine of "stop and frisk" in this court, claiming that the State raised no such argument in the proceedings below.

We do not believe that the semantics of the "stop and frisk" doctrine are helpful under the particular circumstances and thus do not reach the question of waiver. The difference here between "detention" and "arrest" does not assume great importance under the circumstances of the case. (See *People v. Watson* (1974), 321 N.E. 2d 187, 190, ... Ill. App. 3d ..... .) Although the initial stop and forcible holding of the defendants, depriving them of the right to freely leave the area, was a seizure subject to the requirement of reasonableness of the Fourth Amendment of the United States Constitution (See *Terry v. Ohio* (1968), 20 L.Ed. 2d 889, 903-905), the action of the officers in temporarily detaining the defendants in order to maintain the status quo while the officers gathered additional information as to the nature of the object which they had seen Lauderdale throw under another vehicle appears entirely reasonable. This type of initial holding of a defendant can be characteriz-

ed as a "forcible stop" which was approved by the Supreme Court in *Adams v. Williams* (1972), 32 L.Ed. 2d 612, 617.

Once the door lock, which appeared to be from the Corry vehicle, and a tool ostensively used for removing that lock were found underneath the other vehicle, the officers had adequate probable cause to arrest all three defendants. As reasonably incident to that arrest, the officers also had the authority to conduct a warrantless search of the van, where defendant Newton's arrest was made, and to seize the tools as evidence of the offense. *People v. Zazzetti* (1972), 6 Ill. App. 3d 858, 862. See Ill. Rev. Stat. 1971, ch. 38, par 108-1.

Assuming, however, as the defendants contend, the actions of the officers during the initial stages of the defendant's detention amounted to an arrest without probable cause rather than a "forcible stop", this fact would not affect the decision in this case. The trial court does not lose jurisdiction to try the defendants because of an illegal arrest. (*People v. Finch* (1971), 47 Ill. 2d 425, 436; *People v. Bliss* (1970), 44 Ill. 2d 363, 369.) It also would not affect the validity of the search and subsequent seizure of the tools, for the defendant's suspicious behavior and the discovery of the door lock and tool established probable cause to search the van which was in the immediate vicinity and in which defendant Newton was stationed at the time of the crime. The validity of a search conducted pursuant to probable cause, unlike a search incidental to an arrest, is not dependent upon the existence of probable cause to arrest. (*People v. Babic* (1972), 7 Ill. App. 3d 36, 42. See also *People v. Powell* (1972), 9 Ill. App. 3d 54, 57.) Neither does the failure of the officers to secure a search warrant in this situation invalidate the search. Because

of the van's mobility and because it was impossible for the officers to determine if the defendants were the only people connected with the crime, it was reasonable for the officers to conduct a warrantless search in order to prevent the possible destruction of evidence.

We conclude that there were appropriate circumstances for the officers to "forcibly stop" the defendants for an investigation of possible criminal behavior and that the search of the van and the seizure of the tools was reasonably justified either as incidental to a valid arrest or by the presence of independent probable cause.

The defendants were each sentenced to a term of 2-8 years in the penitentiary for the attempt burglary. In their brief, the defendants argue that pursuant to the provisions of the Uniform Code of Corrections attempt burglary is a Class 4 felony with a possible sentence of a minimum of 1 year and a maximum of 3 years. In support of this argument they cite *People v. Scott* (1973), 14 Ill. App. 3d 211. The defendants subsequently moved in this court to reduce the sentence to 1-3 years. The State confessed error and joined in the defendants' motion to so reduce the sentences. This court entered an order approving the confession of error and withdrawing the issue from argument on appeal. Subsequently, however, *People v. Scott* was reversed. (See *People v. Scott* (1974), 57 Ill. 2d 353.) The Supreme Court gave effect to the intent of the legislature and held that the attempt to commit a forcible felony shall not exceed the sentence for a Class 3 felony which, under the Uniform Code of Corrections (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1(b)) is subject to a 1-10 year sentence, but with the proviso that the minimum term may not exceed one-third of the maximum. In this case defendants' sentence could have

thus remained as a minimum of 2 years with a maximum of 8 years.

While we have authority (*Mt. Vernon Girl Scout C. v. Girl Scouts of Am.* (1965), 55 Ill. App. 2d 443, 448-49) to again consider the issue and, if we wish, to remand the case for a re-sentencing hearing before the trial court applying applicable sentencing provisions, we do not choose to do so under the circumstances here. We therefore reduce the sentence to 1-3 years in accordance with the so-called confession of error.

For the reasons we have stated we affirm the judgment below finding each defendant guilty of attempt burglary and adjudge the sentence of each to be 1-3 years in the penitentiary. The convictions and sentences based on the counts of attempt theft and possession of burglary tools are vacated.

Affirmed as modified in part, vacated in part.

GUILD, J. and HALLETT, J. concur.

APPENDIX B

Order Of The Supreme Court Of Illinois Denying Leave to Appeal*

September 25, 1975

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

* No. 47579